

Bourne Manor Extended Health Care Facility and Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 59, International Brotherhood of Teamsters, AFL-CIO and Nancy-Anne Bjorkman. Cases 1-CA-36936 and 1-CA-36993

September 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On June 26, 2000, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified² and set forth in full below.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's credibility findings with respect to the testimony of Respondent's former administrator, Garrett Driscoll, we find it unnecessary to rely on the judge's statement that the razors Driscoll showed to employee Nancy Bjorkman on January 7, 1999, were not the same ones given to Driscoll by Donald Bjorkman on September 8, 1998.

In his recitation of the facts of this case, the judge stated that "[n]o collective-bargaining agreement had been reached as of the date of hearing." The judge sustained an objection to strike testimony regarding whether the parties have reached an agreement. Because the judge does not rely on the absence of a contract in his legal analysis, we find that his reference to facts stricken from the record was harmless error.

In adopting the judge's decision, Member Hurtgen does not rely on remarks protected by Sec. 8(c) as evidence of animus. See his dissent in *Ross Stores*, 329 NLRB 573, 578 (1999).

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

³ In his decision, the judge concluded that the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending and discharging Nancy Bjorkman, finding that the reasons the Respondent asserted for disciplining her were pretextual. In accordance with Board precedent, e.g., *Sterling Sugars*, 261 NLRB 472 (1982), the judge's recommended Order requires the Respondent to remove from its files any reference to the unlawful suspension and discharge. Nevertheless, in his cross-exceptions, the General Counsel contends that the judge's recommended Order should be modified to require explicitly that the Respondent remove from its files any reference to the reasons it asserted for

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Bourne Manor Extended Health Care Facility, Bourne, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise disciplining employees for engaging in union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Nancy Bjorkman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Nancy Bjorkman whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Nancy Bjorkman, and within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bourne, Massachusetts, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized

suspending and discharging Bjorkman. Because we find that the judge has already provided the General Counsel the relief he seeks, it is unnecessary to modify the judge's recommended Order.

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, discharge, or otherwise discipline Nancy Bjorkman or any of you for engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nancy Bjorkman full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Nancy Bjorkman whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Nancy Bjorkman, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

BOURNE MANOR EXTENDED HEALTH CARE FACILITY

Linda Harris Crovella and William F. Grant, Esqs., for the General Counsel.

David M. Mandel and Anthony D. Rozzotti, Esqs., of Boston, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on December 6–8, 1999. The charge in Case 1–CA–36936 was filed by Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 59, International Brotherhood of Teamsters (the Union) on January 11, 1999, and the charge in Case 1–CA–36993 was filed by Nancy-Anne Bjorkman, an individual, on February 1, 1999.¹ An order consolidating cases, consolidated complaint and notice of hearing (the complaint) was issued May 27, 1999. The complaint alleges that Bourne Manor Extended Health Care Facility (Bourne or Respondent) has engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending and then discharging Nancy Bjorkman.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the operation of a nursing home at its facility in Bourne, Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. It further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Alleged Unlawful Conduct

At all material times, Respondent has operated a nursing home in Bourne, Massachusetts. It is one of several nursing homes owned by its parent corporation, Berkshire Health Care Systems. From April 1992 until April 1998, Bourne's administrator was Ken Persinko. From May 1998 until August 1999, Gary Driscoll served in that capacity. From August 1999 to present the administrator has been Thomas Lavallee. From

¹ All dates are in 1998 unless otherwise indicated. Nancy-Anne Bjorkman will hereinafter be referred to as Nancy Bjorkman.

1989 until her suspension and discharge in January 1999, Charging Party Nancy Bjorkman was employed by Respondent as a certified nursing aide (CNA). Bjorkman initiated and was deeply involved in two organizing campaigns by the Union at the nursing home. The last campaign was successful and the Union was certified at the facility the summer of 1998.² Thereafter Bjorkman maintained her high profile as a union activist by participating as a member of the Union's negotiating committee. On January 7, 1999, Respondent suspended Bjorkman and then on January 11, 1999, discharged Bjorkman for the alleged theft of two packages of disposable razors and for taking home and bringing back daily a bottle of sanitizer that was the property of Respondent. This was the only discipline Bjorkman was ever given during her years with Respondent. The General Counsel asserts that the alleged reason for discharging her is pretextual and that she was fired in retaliation for her activities on behalf of the Union. I agree and will find that Respondent violated Section 8(a)(1) and (3) by its discrimination toward Bjorkman.

B. The Facts Behind Bjorkman's Suspension and Discharge

1. Nancy Bjorkman is shown to be a good employee and a leading union activist

Bjorkman was hired as a CNA by Respondent in June 1989. She worked 40 hours a week on the night shift, from 11 p.m. to 7 a.m. Beginning in 1996, she attempted to get the Union in the facility as the representative of the CNAs. In 1996, she contacted the Union and met with some of its representatives and secured authorization cards. She passed them out at work and the workers who signed cards returned them to the Union. Ultimately a petition was filed and an election held, which was lost by the Union. Bjorkman instituted a new campaign in 1998 and this one was successful for the Union. Respondent stipulated that Bjorkman was a leading union proponent in both campaigns and the Respondent was aware of her role in the organizing effort. Bjorkman was an active member of the union negotiating team. Negotiations for an initial collective-bargaining agreement began in August and Bjorkman attended five or six bargaining sessions before being fired in January 1999. No collective-bargaining agreement had been reached as of the date of hearing.

Respondent stipulated that Bjorkman was regarded by it as a good dependable employee. She was named employee of the year in one of her years with Bourne. As noted earlier, Respondent terminated Bjorkman allegedly for the theft from the facility of two packages of disposable razors and for taking to and from work a bottle of Respondent's sanitizer, Purell.³ Respondent learned of the alleged act of theft from Bjorkman's estranged husband, Donald Bjorkman. In February 1998, Nancy Bjorkman obtained a restraining order against her husband. This order was modified in mid-April to allow child visitation. Since obtaining the restraining order in February, Nancy Bjork-

man has lived in the family home with three of her four daughters and a granddaughter. Donald Bjorkman has lived elsewhere.⁴ Respondent stipulated that Nancy Bjorkman informed it that she had a restraining order against her husband.

On August 28, Bjorkman changed the locks at her house to prevent her husband from entering it. On that day, her husband did try to enter and was unsuccessful. He became angry and yelled at Bjorkman, telling her, "I will get you for this."⁵ Donald Bjorkman was serious.

2. Nancy Bjorkman and another employee are accused of theft by her husband and Respondent pursues the accusation against Bjorkman, but not the other accused employee

Bourne's then administrator, Driscoll, testified that on August 28, Donald Bjorkman called him at his office. Bjorkman told him that his wife had changed the locks on their home and that their long-term marriage was going down the tubes. Bjorkman said he was going to get even with his wife and then accused her of stealing from the nursing home a long list of items over a long period of time. Bjorkman then accused Respondent's nursing supervisor, Mike Silva, of passing information to the Union and letting union representatives into Respondent's offices at night.⁶ He then accused his wife of stealing diet pills and giving them to fellow CNA Amy Cordoza. Bjorkman warned Driscoll not to call the local police because the brother of a friend of Bjorkman's wife works for the police. In a subsequent conversation, Donald Bjorkman told Driscoll that Bourne Manor nurse, Arlene Lima, was stealing items from the nursing home and reselling them to the public. In yet a later conversation Bjorkman accused Lima of smoking pot.

After concluding his conversation with Bjorkman on August 28, Driscoll immediately called Jeff Stevens, the director of human resources for Respondent's parent corporation. He testified that he realized that Nancy Bjorkman was a leading union activist and was worried about where his actions in response to Donald Bjorkman's accusations would lead him. He told Stevens what Donald Bjorkman had told him and was advised by Stevens to call Ken Persinko who had received a similar call from Donald Bjorkman a few years earlier.

Driscoll then called Persinko and related at least the portion of the call from Bjorkman that related to Nancy Bjorkman. Driscoll testified that Persinko said that Bjorkman had told him a similar tale in about 1994 and that Bjorkman had offered to provide proof. However, before they could meet, Bjorkman suffered a heart attack and Persinko never did meet with him.

⁴ There was an issue raised by Respondent about whether Donald Bjorkman lived in the family house until August 28, the restraining order notwithstanding. Nancy Bjorkman testified that this was not the case and that Donald Bjorkman had not lived in the house since the granting of the restraining order in February 1998. Donald Bjorkman did not testify. The only other evidence on this point is clear hearsay. I credit Nancy Bjorkman on this point.

⁵ In October, Bjorkman had her husband arrested for a violation of the restraining order.

⁶ Driscoll evidently believed this accusation involving Silva, noting in his testimony that he had for some time suspected someone was going through files and using the office xerox machine without authorization.

² The only unfair labor practices alleged in either campaign are those being litigated in this proceeding.

³ The Respondent's employee handbook provides that theft or removal of property from its facility is punishable by immediate termination.

Persinko testified that about February 15, 1994, he received a memo from Bourne's director of nursing. The memo stated that she had received a call from a Jim Gibson, who accused employee Arlene Lima of stealing property from the facility and selling the property from her house. Persinko then called the local police reporting the call and asking if they could help get to the bottom of the accusation. According to Persinko, he was instructed to first do an internal investigation. Persinko received a call from Donald Bjorkman in May or June 1994. In this call, Bjorkman first identified himself as Jim Gibson, then revealed his true identity.⁷ Bjorkman told Persinko that his wife Nancy and another employee, Arlene Lima, were stealing toiletries from the facility and selling them. Bjorkman agreed to bring in samples of the stolen merchandise within a few days. About 3 weeks then passed without Donald Bjorkman contacting Persinko. Persinko then learned that Donald Bjorkman had had a heart attack. Though he did not again speak with Donald Bjorkman, Persinko assumed that he did not bring in the allegedly stolen merchandise because of his health problems. At the time of the February memo and the May-June calls from Donald Bjorkman, Persinko instructed supervisors to look for any evidence of theft from the facility. At some point in this rough timeframe, a pillowcase full of Respondent's toiletries was found hidden in a corner of Respondent's storage room. Persinko then looked into installing a video camera in the storage room, but that course of action was too expensive. He inquired of the person in charge of the storage room whether more toiletries than usual were being used, and that person was not sure. Nothing was ever developed that tied the sack of toiletries to any employee. At some point during this period of accusations, Persinko spoke with the Respondent's parent company's human resources director about the accusations. Persinko was told that without physical proof, he should not pursue the matter. Persinko did alert the supervisors to watch Nancy Bjorkman. When he followed up with them at a later point, they informed him they had not seen Bjorkman taking anything.

Within a couple of days after talking with Persinko, Driscoll again spoke to Stevens, who advised that if some proof was forthcoming from Bjorkman, to continue to pursue the accusations. On the other hand, if Bjorkman could not provide evidence, Stevens advised Driscoll to drop the matter. Driscoll also spoke to the person in charge of inventory control for the facility and learned there was no way of telling if items were being stolen because of deficiencies in Respondent's inventory control program. This was the extent of his "investigation" into the allegations of theft by employee Arlene Lima.

Driscoll said he looked into the matter of the alleged pill theft and determined that the facility did not have an inventory control procedure for the type of pills Bjorkman was alleged to be taking, so he immediately stopped investigating this allegation. Though he talked with supervisory personnel about how to investigate the matter, he did not ask any supervisor or employee if they knew anything about Nancy Bjorkman stealing medication. This was the totality of his "investigation" into the

alleged pill theft. In support of this unusual lack of interest in the allegations made against Bjorkman regarding pill theft and Lima regarding theft of many items, Driscoll said that he did not pursue the matter because Donald Bjorkman did not give him physical evidence supporting these allegations of theft. I cannot find in the record where Driscoll even asked Bjorkman to produce evidence supporting his allegations of theft by Lima. In any event, he asked no supervisor or employee if they knew anything about theft by Lima. He never confronted her about the allegations of theft.

3. Driscoll seeks evidence from Donald Bjorkman

On September 7, Driscoll again spoke over the phone with Donald Bjorkman. Bjorkman reiterated his desire to get revenge against his wife. Driscoll then told Bjorkman that he had to supply some physical evidence or Driscoll could not pursue the theft allegations. Bjorkman said he *might be able to get some* and they ended the conversation. (Emphasis added.)

Donald Bjorkman called Driscoll the following day. Bjorkman said he had evidence for Driscoll in the form of razors. Driscoll told him to meet him at a parking lot in town and they did meet about half an hour later. Driscoll did not take a witness with him. According to Driscoll, Bjorkman gave him a plastic Wal-Mart bag containing two sealed 10 packs of disposable razors. Driscoll testified that Bjorkman said they came from his home. Driscoll, knowing that Bjorkman had been locked out of his home, testified that he assumed that Bjorkman acquired the razors before he left. On the other hand, in their conversation the previous day, Bjorkman did not say he had evidence, rather, he only indicated that he might be able to get some. He certainly did not say he was in possession of disposable razors that had come from the nursing home.

It would appear more likely that Donald Bjorkman acquired the razors after being told by Driscoll that he had to have physical evidence. Given the fact that he could not get into his house, it is more likely that he stole them from the nursing home himself. Donald Bjorkman was also an outpatient at a local hospital that used disposable razors identical to the ones used by Bourne and could have obtained them from this source.

Driscoll left this meeting and returned to the nursing home. He testified that he went to the storage room and found that the razors supplied by Donald Bjorkman were identical to the ones used by Bourne.⁸ Driscoll admitted that they do not specify they are from Bourne Manor and could have come from some other source.

In any event, the next day, Driscoll again spoke with Human Resources Director Stevens and told him what had happened. Stevens gave him instructions on how to proceed. Driscoll arranged for Donald Bjorkman to come to the nursing home and be interviewed by Respondent's attorney. Following this meeting, the attorney prepared an affidavit for Bjorkman's signature and sent it to him for signing in late September. Bjorkman did not return the affidavit. In late November another copy of the

⁷ Donald Bjorkman also initially called himself Jim Gibson in his August 28 call to Driscoll.

⁸ The razors involved in this proceeding are Gillette disposable razors packaged in packs of 10. The packets have printed on them: "Not for Retail Sale." They also contain the wording: "Catalogue No. 4471GM, Baxter, distributed by Baxter Health Care Corporation, Deerfield, Illinois."

affidavit was sent to Bjorkman. According to Driscoll, this one was returned in the first week of January 1999 and he got a copy that week.⁹

4. Driscoll finally confronts Nancy Bjorkman about the allegations of theft

Driscoll testified that he did not want to confront Nancy Bjorkman with the allegations until he received the signed affidavit from Donald Bjorkman. Without the affidavit, he did not consider the razors evidence enough to proceed. Yet, contrary to his assertions, he decided in December that the matter had been dragging on too long and he finally confronted the accused.

On December 7, Bjorkman was called into Driscoll's office. Driscoll informed her she was under investigation for theft. She expressed disbelief and he assured her he was serious. She inquired if her husband was behind the investigation and Driscoll said yes. Driscoll then asked her a series of questions and documented her answers. He asked if she had ever taken Respondent's property for her personal use and she answered no. He asked if she had ever taken Respondent's property from the nursing home to her residence. She answered that she had taken a bottle of a sanitizing product, Purell, explaining that it was not always available on her shift so she carried it with her. This product is used to clean aides' hands and medical instruments between handling patients. To demonstrate what she was talking about, she reached into the bag in which she carried personal items and pulled out a bottle of the sanitizer.¹⁰ Though Driscoll testified that he thought this was a serious matter, he did not ask her to show him the contents of her bag. He never asked to look in the bag.

Driscoll then asked a series of questions to discover if she had taken home certain items he enumerated and she denied doing so. Last he asked if there was ever in her home any sealed bags of disposable Gillette razors labeled "Baxter for institutional use." Bjorkman said there might have been as she buys disposable razors for herself and her daughters.¹¹ She denied taking any razors from the nursing home. The meeting ended with Bjorkman urging Driscoll to continue the investigation by speaking with her coworkers.

Bjorkman next met with Driscoll on December 10 after a union negotiating meeting. At this meeting Bjorkman recalls Driscoll calling her husband a "class one act" and noting that he

believed him about the allegations of theft. Driscoll also noted that her husband was out for revenge.¹² Bjorkman had heard nothing from her coworkers about any investigation and she asked Driscoll when he was going to interview them. Driscoll did not answer. At this meeting, Driscoll seized upon Bjorkman's admission she takes Purell home between shifts. In response to his questions, she related that the Purell stays in a bag in her car when not at work and is not used for personal reasons. She indicated she did not always take Purell with her and that she had been taking it with her for about a year. She denied ever keeping Purell at her home. She told him she had not discussed this practice with any supervisor. She indicated she did not have access to the area where Purell was stored. She agreed with Driscoll that she could have left the Purell in her locker at the nursing home, but noted that it was easier just to leave it in her bag. She again denied taking any other items away from the nursing home.

Driscoll, on prompting, remembered he had asked the Respondent's staff development coordinator about the Purell situation. This person told him that the product is stocked for the use of nurses and CNAs to supplement hand washing, primarily during the passing of meals and giving of medications. Driscoll was immediately struck by the thought that meals are not given on Bjorkman's shift. He did find that Bjorkman was telling the truth about the central supply where Purell is kept being locked during her shift. Based on a note he made himself, he believed that Purell was available at nurse's stations. Where he got this information is a mystery. He admitted he did not ask employees about the availability of the product at the nurse's stations. Bourne's former nursing supervisor, Michael Silva, *inter alia*, corroborated Bjorkman's assertion that Purell was not always available on the units and if not on the unit, it would not be available to aides on the night shift. He also testified that it would have been useful to Bjorkman on her shift when dealing with patients.

Driscoll testified that at this meeting he told Bjorkman that he had received from Donald Bjorkman razors that Nancy Bjorkman had allegedly stolen. Nancy Bjorkman remembers this information being given at a meeting held on December 16. Regardless of which date is correct, Driscoll at some point around mid-December related the fact of the razors to Bjorkman. According to Driscoll, she again denied stealing the razors and told him to ask her husband where he got them.¹³

On December 16, Driscoll again met with Bjorkman about the theft issue. She was accompanied on this date by Union Representatives Rick Fernandez and Tony Cruz. Driscoll asked some questions and Bjorkman and the representatives asked if he had spoken with any other workers about the allegations. They also noted that they believed other employees had been accused of theft and wanted to know if they were also being investigated. The representatives asked for the names of the

⁹ Driscoll testified that he had a conversation with Bjorkman about the delay in signing the affidavit. Driscoll testified that Bjorkman told him that his attorney had advised him not to sign it as he might suffer some unspecified economic harm as a result. As noted earlier, Donald Bjorkman did not testify. The signature on the affidavit may be Bjorkman's or it may not be. Comparing the signature on the affidavit with Bjorkman's signature on official court documents is not conclusive. Not one testified that they saw Bjorkman sign the affidavit. I will accept the affidavit into evidence only for the purposes of adding to the understanding of the testimony about it. I do not give credit to any of its contents and do not accept those contents as proven fact.

¹⁰ In this bag Bjorkman had a calendar, cigarettes, a calculator, a medical dictionary, coffee, a gate belt, hand lotion, pencils, and other personal items.

¹¹ Bjorkman testified that she buys packs of Gillette disposable razors for about a dollar to a dollar and a quarter at local discount stores.

¹² Respondent's counsel in his questioning of Bjorkman indicated his doubt that Driscoll told her that he believed her husband. Driscoll himself testified that he did.

¹³ There is some dispute about whether certain things happened at the December 10 meeting, at the December 16 meeting, or at a meeting held January 7, 1999. I do not think it important as there is no real dispute that these things happened at one meeting or the other.

other accused employees, but Driscoll did not disclose them. Fernandez remembers Driscoll asking about the Purell matter and being told by Bjorkman that it did not leave her car and that she brings it back daily. Driscoll told them that he considered the credibility of Donald Bjorkman to be good, mentioning the razors. Fernandez told Driscoll that the same kind of razor blades, including the Baxter name, could be obtained at Tobey Hospital, a local mental hospital. Fernandez or Cruz also asked Driscoll if Donald Bjorkman had been in Bourne Manor and Driscoll did not know.

About the middle of December Respondent received two letters from employees and a petition signed by 18 employees vouching for the honesty of Nancy Bjorkman. As will be discussed below, Driscoll did not want these.

5. Driscoll comes to the conclusion that Bjorkman should be terminated

During the first week of January 1999, Driscoll received the signed affidavit from Bjorkman. Driscoll testified that on January 6, 1999, he sorted through what he knew and thought about the Bjorkman situation and wrote his conclusions.

He wrote:

“FACTS:

1. D.B. no longer lives with N.B. who had the door locks changed to keep D.B. out of the house.¹⁴
2. N.B. has a restraining order out against D.B.
3. D.B. would like to extract some revenge from N.B.
4. D.B. informed Bourne Manor that N.B. had been stealing from the facility for years.
5. To back up his claim, D.B. delivered 2 bags of razors that he alleged N.B. had stolen from Bourne Manor.
6. N.B. denies the allegations and claims that her husband is not stable and that he has concocted the allegations to get her into trouble and do her harm.

IF: D.B. has falsely accused N.B.

THEN: D.B. would have had to preplan his presentation of the physical evidence. This would entail:

1. Advance knowledge that we might require evidence.
2. Knowledge of the brand of razors used at the facility.
3. Knowledge of the name of the distributor that packaged the razors.
4. The ability to then obtain the correct merchandise before I asked for the proof,

OR:

5. Accomplish the above within 24 hours of being asked for physical proof

HOWEVER:

I do not sense that either scenario is appropriate. Too much needed to fall in place. Having spoken to D.B. numerous times and having met with him on three separate occasions, I find myself questioning his ability to manage and carry out such a plan as well as his ability to maintain

the physical drive necessary to complete the plan. For my part, a much more believable scenario would be for D.B. to float the allegation and back it up with more allegations, not with physical evidence.

Conversely, I find it credible to accept that his access to the physical evidence was made possible because the merchandise was in the home he shared with N.B. It is an explanation that fits the circumstances, the individual, and my best assessment of both.

AND SINCE:

N.B.'s explanation, that

D.B. is not stable,

D.B. is only out to cause N.B. trouble,

And, maybe, D.B. bought the evidence at BJ's or another store (the evidence in question is not sold through retail channels.)

Does not provide me with any substance with which to discredit the facts as presented by D.B.

CONSEQUENTLY:

Based on the information at hand, the physical evidence at hand, and my assessment of both as of this 6th day of January, 1999, it is my conclusion that N.B. has committed, 'Theft or removal of property from the facility premises.'"

As an observer of this trial, I believe that a scenario never crossing Driscoll's mind seems even more likely. That is, Donald Bjorkman stole the razors from the nursing home. That would explain why he thought he could get evidence of theft without telling Driscoll what it would be until he had it. It would explain how he got the razors when he was admittedly locked out of Nancy Bjorkman's house. It would explain how he knew what kind of razor the nursing home used. It does not take a mastermind to walk into a nursing home that is without security and go to the storage room and walk away with two bags of razors which would fit easily into a pants pocket. Former Nursing Supervisor Silva testified that nonresidents were in the nursing home from time to time. These included relatives of the residents and employees. There was evidently no security prior to the time Bjorkman's husband gave Driscoll the razors. Silva testified that the razors were kept in a utility room, which was unlocked. Donald Bjorkman's daughter, who is employed by Bourne, offered evidence that he came to the nursing home on August 29 or 30. She spoke to him in the hallway near the dining room. Driscoll never asked the daughter or any other employee if they had seen Donald Bjorkman at the nursing home prior to his giving the razors to Driscoll.

Driscoll assumes that Bjorkman took the razors when he moved out of Nancy Bjorkman's. Even accepting arguendo that Donald Bjorkman was living at Nancy Bjorkman's house up to August 28, there is no showing he knew the locks would be changed on that date. If he was living there, he was locked out without prior knowledge he would be locked out. Thus, he would not have left with a supply of toiletries on that date. I find the scenario that Donald Bjorkman stole the razors himself more likely.

¹⁴ D.B. is Donald Bjorkman and N.B. is Nancy Bjorkman.

I would also note that Driscoll's written set of conclusions which led to Bjorkman's termination does not even mention the matter of Purell.

6. Driscoll suspends, then terminates Nancy Bjorkman

On January 7, 1999, Driscoll summoned Bjorkman to his office. She took the two union representatives with her. At this meeting, Driscoll gave Bjorkman the affidavit purportedly given by her husband. The affidavit accuses Bjorkman of stealing from the nursing home for 9 years. Specifically it accuses her of stealing bags of razors, cans of shaving cream, tubes of toothpaste, toothbrushes, and medical lotions and salves such as Ben-Gay and Neosporin.¹⁵ This theft was alleged to be regular. On a less regular basis, he accused her of stealing facecloths, towels, sheets and blankets, and nutritional drinks intended for patients.

The affidavit continues with a representation that the husband had given this information to Driscoll and had offered to bring proof of the theft. In that regard, the affidavit represents that the husband provided two sealed bags of razors that he alleged Bjorkman had brought home from Respondent's facility.

Bjorkman branded the affidavit as lies and denied the allegations. Driscoll then showed her two bags of razors, presumably the ones given him by her husband.¹⁶ She denied taking them, and asked if he had spoken to coworkers. He named no coworker to whom he had spoken. The union representative asked if other employees the husband had accused of theft were being investigated and Driscoll said no.

At this meeting, Bjorkman pointed out to Driscoll that Donald Bjorkman had not lived at her home since she got a restraining order in the spring of 1998. She said there was court records of a break in by him in April 1998. She asked him to check with Social Security to see where they had been sending his disability checks. One of the Union representatives also noted that Donald Bjorkman had been a patient at Tobey hospital, which used the same kind of razors as Driscoll was showing them. Driscoll suspended Bjorkman without pay at the conclusion of this meeting. He testified he wanted to check out some things that were brought up at the meeting before terminating her.

Driscoll testified that he thereafter called Donald Bjorkman's landlady, who agreed with his question suggesting August as the date Bjorkman moved into her apartment. He spoke again with Bjorkman who purportedly told him that he had been forced to leave his residence in February, but moved back in March and that fact was kept secret so he could collect a full disability check. Driscoll testified that he checked with the local court and could not find evidence of a break in April

1998. In this regard, General Counsel's Exhibit 3, a copy of a restraining order in favor of Nancy Bjorkman against Donald Bjorkman reflects that he was restrained from contact with Bjorkman on February 26, 1998, and that the order was modified on April 10, 1998. Thus, contrary to what Driscoll was told by the court, there was a court appearance in April 1998 by Nancy Bjorkman. At this time Driscoll also learned that Bjorkman had been arrested in October for violating the restraining order.

Driscoll then checked with Tobey Hospital and learned that they indeed did carry the same razors.¹⁷ He knew that Donald Bjorkman had been a patient at that hospital, but did not inquire of him whether he had been a patient there in August or September.

Notwithstanding his discovery that identical razors were available to Donald Bjorkman at a hospital at which he was a patient, Driscoll terminated Nancy Bjorkman's employment the next week. Incredulously, he testified that he thought Bjorkman's removal of Purell and disposable razors from the facility without authorization was an offense of the same nature as patient abuse. He testified, though having none of the physical evidence he so strongly gives credence to, that he believed Bjorkman was stealing other items as well, noting, without any supporting evidence, that the home had a longstanding theft problem. The only documented evidence of a theft problem has to do with theft of property from residents.

The matter of the Purell will be addressed here. It is clear that Bjorkman was not taking the Purell for personal, nonwork-related use. She was simply carrying a bottle of the sanitizer to ensure she had it when she needed it at work. Though this practice is perhaps a technical violation of Respondent's rule, it certainly did not violate the spirit of or reason for the rule. It is clear that Respondent did not consider this as theft or it would have terminated her immediately on her admission that she carried the Purell away from the facility. Driscoll's action, or inaction, following Bjorkman's admission shows that the matter was actually of no real concern to Respondent. He did verify that she was telling the truth in that she could not get Purell from the supply room in which it is kept as that room is locked at night. He made no effort to learn whether her supervisor knew she was taking the Purell in her bag, nor did he investigate to determine whether this was a common occurrence among Bourne's staff. I believe and find that matter of Purell was of no consequence and was merely used as a make weight to bolster Respondent's theft case.

C. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violation of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's

¹⁵ Bjorkman told Driscoll at this meeting that Ben-Gay is not used by the Respondent. He never bothered to check her assertion.

¹⁶ In this regard, we have only Driscoll's word that the bags he showed Nancy Bjorkman are the ones given him by Donald Bjorkman. There was no witness to the exchange and of course, Respondent did not call Donald Bjorkman as a witness. Curiously, the affidavit does not mention anything about the razors other than they are packages of Gillette disposable razors. It does not identify them as being supplied by a company called Baxter.

¹⁷ Driscoll then called some other local nursing homes to see if they carried the Baxter packaged razor. They did not. Though he knew the name of the distributor of the Baxter packaged razors, he did not call this distributor to ask what other entities in the area they supplied the razors to.

decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

Counsel for the General Counsel has made such a prima facie case and meets the burden of persuasion. We are not dealing here with a malcontent or problem employee. Nancy Bjorkman was a long time, well-respected employee of Respondent. She had never been disciplined and absolutely no problems with her job performance will be found in this record. When out of the blue, an honest employer receives allegations of theft by such an employee, the only rational response would be to sincerely hope that they are not true. That was not the response of Driscoll. Of course, there is the matter of Nancy Bjorkman's union activities. Respondent and more specifically, Driscoll were well aware that Nancy Bjorkman was the leading union supporter. Her activities on behalf of the Union were many and well known. Respondent stipulated that it was well aware that Bjorkman's activity as a lead union proponent, an observer at the election, and an active member of the negotiating committee up to the time of her discharge. She was also a "thorn in the side" of Driscoll or "a pain in the ass" to him for, inter alia, making him "eat crow" and write a letter admitting error in a newspaper interview shortly after the union election. Former Nurse Supervisor Silva testified that Driscoll had indicated that he considered Bjorkman a thorn in his side. Though arguing with Silva's use of words, Driscoll recounted the newspaper incident and allowed as he might have used the words "pain in the ass" to Silva. Silva also testified and I credit that Driscoll was opposed to unionization. Silva characterized Driscoll's feelings about the Union as disdain and arrogance. I believe the characterization to be accurate. Silva was working at Bourne on a per diem basis when Donald Bjorkman accused him of helping the Union by giving it information and providing access to the facility at night. Without any investigation, Driscoll had Silva barred from ever entering the facility again.

As further evidence of its knowledge, Driscoll, who was new to the facility during the last month of the organizing campaign, repeatedly testified that he knew his discharge of such an active union proponent would wreak havoc in the facility. Certainly, Bjorkman's union status was uppermost in Driscoll's mind when he first heard the accusations from Donald Bjorkman, as the first person he called thereafter was Berkshire's human resource director. Thus, it is undisputed that Bjorkman was heavily involved in union activity and such was well known to Respondent.

The final element, whether Respondent was motivated by unlawful considerations, is the crux of this case. I believe Respondent conduct during its "investigation" of the allegations leveled against Nancy Bjorkman, established beyond doubt that the asserted reasons for Bjorkman's discharge are purely pretextual. "The failure to conduct a meaningful investigation or to

give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent." *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). See also *Electric South, Inc.*, 327 NLRB 270, 287 (1998); and *New England Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998).

I believe and find that the investigation conducted by Driscoll was a total sham, and had as its purpose the sole goal of affording an excuse to rid the facility of Nancy Bjorkman. I do not believe her true guilt or innocence made any difference whatsoever in the decision to terminate her. The reasons for my belief and findings in this regard are many. First, Nancy Bjorkman was not the only employee accused of theft by Donald Bjorkman. Employee Arlene Lima was also implicated in wrongdoing. She was accused of stealing a laundry list of Respondent's property and reselling these items. Yet Driscoll did virtually nothing to investigate Donald Bjorkman's claims with respect to her. He noted that the Respondent's inventory control procedures would not help determine if theft of the involved property was occurring. But that was true in Nancy Bjorkman's case as well, and it did not stop him from pursuing allegations against her. Driscoll further claims he did not pursue allegations against Lima because he did not have any physical evidence, such as razors, to support the accusations. This is patently absurd. First, if one is not offered such evidence without asking, one must ask to get such evidence. There is no showing that Donald Bjorkman was ever asked to provide evidence with respect to his allegations about Lima. Perhaps he got the razors from her.

Second, a standard form of investigation and one used by Respondent in another employee theft case, is to ask supervisors and fellow employees if they have any knowledge about the allegations. Though this technique was followed to secure evidence that led to the discharge of another employee accused of stealing Respondent's property, Driscoll did not ask anyone about the allegations against Lima. Further, Respondent has been shown to confront and ask employees accused of theft about the accusations. In the fall of 1999, Respondent immediately did just that when a nurse was accused by another nurse of stealing medication. The accused nurse admitted the theft and was terminated immediately.¹⁸ Driscoll did not call the police and report the allegations, even after receiving the razors. The record shows that Respondent had called the police in other instances of suspected theft. This failure to do so is strange since Driscoll compared the allegations against Nancy Bjorkman as equal to patient abuse, which is about the most serious charge than can be leveled against a health care provider. Such patent disparity in the investigation of Bjorkman as opposed to Lima, and Driscoll's refusal to even use Respondent's commonly used forms of investigation into the Lima allegations, is sufficient in my estimation to clearly demonstrate that unlawful motivation and animus were the moving

¹⁸ Respondent's food service supervisor reported to Persinko that a cook named Rogers was stealing food. Persinko had the supervisor question other employees and he came up with statements from those with knowledge of the thefts. Persinko testified that the normal way to do an investigation is to ask staff for their knowledge. Lavalley was notified by a nurse that another nurse was stealing medications. He immediately confronted her about this allegation and she admitted it.

force behind Respondent's investigation of Nancy Bjorkman. "Blatant disparity is sufficient to support a prima facie case of discrimination." *Dynabil Industries*, 330 NLRB 360, 363 (1999). Importantly, Lima, as opposed to Bjorkman, had no involvement with the union organizing campaign in 1998.

Further, other evidence shows that Respondent was not trying to truly investigate and get at the truth. Before terminating Nancy Bjorkman, Driscoll knew that Donald Bjorkman was out for revenge against his wife, had been a patient at an area mental institution during the investigation of Nancy's alleged theft, and had been arrested in October for a violation of the restraining order against him. He, however, considered Donald Bjorkman to be trustworthy, more trustworthy than Nancy and other longtime employees at the facility. He evidently did not find trustworthy the two longtime employees who wrote letters to management in support of Nancy Bjorkman and who unequivocally stated they had never seen her take Respondent's property. He did not find trustworthy the 16 other employees who sent a petition to management vouching for the honesty of Nancy Bjorkman.¹⁹ He did prepare, after the December 7 meeting, a detailed and very rational questionnaire for employees designed to learn what they knew about employees taking Respondent's property without authorization. He chose however not to use it. His reasons for not using it were:

I did not [distribute it]. The information I was seeking, I think I pretty well received in the petitions that were signed and handed over to me. This would have been a duplicate [sic] of effort. There's only two things I could have had from this portion of the investigation, was proof from someone else in the facility that they actually saw Nancy removing merchandise from the facility or, no, two, proof that she did not do that. And I did not feel, after putting this together, because I had used this approach in the past in another situation, I didn't feel that, after going through the work of putting this together, I did not feel that it was going to answer either of those questions for me, so I did not bother to take this step.

The only conclusion he could have rationally drawn from the petitions to which he makes reference is that Nancy Bjorkman was honest and trustworthy. Driscoll evidently did not want to develop evidence to support that proposition. As he stated a little later in his testimony, "Relative to that, [whether Bjorkman took property from the facility], I had received these, the letters, the petitions, and these are primarily all the long-term employees in the facility, who had worked here from night, from day, from evening, and it was pretty obvious in the papers that they were supporting, through this (letters and petitions), the fact that Nancy had not taken anything out of the facility." (Emphasis added.)

Driscoll then testified that if all the employees at the nursing home were interviewed and each said that Nancy Bjorkman had not taken anything from the home, that would not have been proof that she did not do it. Instead he relied solely on the word of Donald Bjorkman. Driscoll also testified that the matter of

the accusations against Bjorkman came up in a managers meeting. The managers present expressed the concern that if Bjorkman were terminated for theft, it would have a negative impact on the facility. They noted that Bjorkman was a good employee. None of the managers present gave any indication that they believed Bjorkman was taking the facility's property without authorization. Again, Donald Bjorkman's trustworthiness is viewed by Driscoll as better than his own management. I view this entire portion of Driscoll's testimony as clearly showing that he had only one goal in his so-called investigation, to fire Bjorkman without any regard to the truth.

Though the testimony discussed immediately above is, like the matter of disparity of treatment, sufficient in and of itself to prove unlawful motivation, there is more. Looking more carefully at whom Driscoll would have one believe he believed, there are far more questions than rational answers. Rather than give the benefit of the doubt to an exemplary 9-year employee, Driscoll chose to believe a man who he implied was "odd," a drinker who lacked ambition, who ranted about revenge, and made bizarre new allegations against employees each time he spoke to Driscoll. Driscoll knew that Bjorkman had a restraining order against him and had violated it. He discounted or did not believe some of the things Bjorkman told him. Yet he believed him over Nancy Bjorkman and all of the longtime employees who supported her on the issue of alleged theft.

This leads me to the razors. By hearing's end, my faith in Driscoll's credibility was completely gone. I really no longer believe that the razors shown to Nancy Bjorkman in the January 7, 1999 meeting were even the one's given Driscoll by Donald Bjorkman. At every turn, Driscoll refused to consider any other "scenario" other than one in which Donald secured the razors from his home. As I have pointed out earlier, a stronger case can be made that Donald Bjorkman stole the razors himself. He had the opportunity and the motive. He was proven to be in the nursing home the week before he gave the razors to Driscoll. Driscoll knew he had been locked out of his house and admitted that this was probably done without Donald Bjorkman's prior knowledge. In these circumstances, it is highly unlikely he got the razors from his house. Driscoll also completely failed to follow up and question Donald Bjorkman when he learned a local hospital at which Bjorkman had been a patient used the same razors as Respondent. As was the case with the unused questionnaire, he clearly did not want to know.

Respondent evidently did not want me to learn the truth either. It did not call Donald Bjorkman though he was the sole source of evidence adverse to Nancy Bjorkman. I draw an adverse inference from its refusal to call him and subject him to interrogation about the matter of the razors and the allegations he made. See *Avondale Industries*, 329 NLRB 1065 (1999). I specifically draw the inference that Donald Bjorkman would have testified that he did not get the razors from Nancy Bjorkman's home, and she did not take them from Bourne.

The General Counsel, for each and all of the reasons set forth above, has established not only a prima facie case of unlawful motivation, but also a compelling one. Respondent has wholly failed to offer convincing proof that it would have suspended or terminated Bjorkman absent her protected activity and its animus toward that activity. To believe Respondent was acting

¹⁹ See GC Exh. 7. Eighteen employees signed the petition, but two of them were the writers of the letters noted above.

from lawful motivation, one must find that Driscoll had a good faith belief that Donald Bjorkman was telling the truth about his wife. Based on my assessment of Driscoll's credibility alone, that is a lost cause. I do not believe Driscoll on any issue dealing with motivation behind the firing of Bjorkman. Based on the objective evidence in this record, Donald Bjorkman was the last person in the world a rational person would believe with respect to his wife. He was shown to have been receiving mental care, was the subject of a restraining order for spousal abuse, had been arrested for violating that order, and was a man considered a drinker and odd by Driscoll. Yet Driscoll would have me believe that he believed Bjorkman over the word of Nancy Bjorkman and the host of fellow employees and managers who implored Driscoll to believe his good, honest employee. As set out in detail above, Driscoll ignored all evidence that proved N. Bjorkman's denial of theft, and ignored every avenue of investigation that might prove her right. All of Driscoll's failures in the investigatory process cast crushing doubt on Respondent's asserted good-faith belief in Donald Bjorkman's accusations. An assertion of good-faith belief will not be supported when the respondent has failed to conduct a proper and complete investigation. See *Fairfax Hospital*, 310 NLRB 299, 301 (1993); *Union-Tribune Publishing Co.*, 307 NLRB 25, 49-50 (1992); and *Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730 fn. 3 (1998).

For all the reasons set above, I find that Respondent has violated Section 8(a)(1) and (3) by suspending and terminating its employee Nancy Bjorkman.

CONCLUSIONS OF LAW

1. Respondent Bourne Manor Extended Health Care Facility is an employer within the meaning of Section 2(2), (6), and (7)

of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by suspending and then terminating its employee Nancy Bjorkman for engaging in union or other protected concerted activities.

4. The unfair labor practices found to have been committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended its employee Nancy Bjorkman on January 7, 1999, and then discharged her on January 11, 1999, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent is further ordered to, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge and notify Nancy Bjorkman in writing that this has been done and that the suspension and discharge will not be used against her in any way.

[Recommended Order omitted from publication.]